December 31, 1829, were abolished. To the minds of the New York Revisors it was "an affront to common sense to say that a man has no property in that which he may sell when he pleases and dispose of the proceeds at his pleasure," and from that view-point they wrote a new law of powers. Under it, a power by which a donee may dispose in his lifetime of the entire fee for his own benefit, if no remainder is limited, gives the donee the absolute property. Where a remainder is limited the donee has a fee as regards creditors, purchasers and incumbrancers; so also where he is given a beneficial power to appoint by will, coupled with an estate for life or for years. Real Prop. Law, §§ 129-133; *Deegan* v. *Wade* (1895) 144 N. Y. 573. But it has been held that the exercise of a beneficial power by the will of an *equitable* life tenant does not subject the *corpus* of the trust estate to the claims of creditors. *Cutting* v. *Cutting* (1881) 86 N. Y. 522. Thus the doctrine of appointed powers as equitable assets, which was formerly applied in New York, *Tallmadge* v. *Sill* (N. Y. 1855), 21 Barb. 34, is no longer law. In a recent case, it was held, however, that if such a life tenant has a power of appointing the entire equitable fee by deed, though the legal title cannot be passed during the term of the trust, an interest has been conveyed which creditors may reach. *Farmers' Loan & Trust Co.* v. *Kip* (N. Y. 1908) 85 N. E. 59 (*semble*). Legislation on powers, such as that of New York, has destroyed to a large extent the integrity of a very highly developed and intricate branch of the common law, but in practice it is probable that greater justice is obtained. A power *as such* has not been converted into property. But while at law an absolute power gave property only if appointed to the donee himself, and in equity an *exercise* of the power to volunteers was at once a receipt of property by the donee and his fraudulent conveyance of it, under the New York Statutes the power *unexercised* in some cases invests the property subject to appointment with many incidents of ownership in the donee, in other cases vests in him the absolute property.

Aspects of the Right to Recover for Benefits Conferred under Mistake of Fact.—The limits of the right to recover *quasi ex contractu* for benefits conferred are, from the nature of the remedy, uncertain. Of course, enrichment at the plaintiff's expense is alone not enough to bind the defendant *ex æquo et bono*: as when the benefit was intended as a gratuity; or resulted as an inevitable incident to benefits secured to the plaintiff. *U. S.* v. *Pac. R. R.* (1887) 120 U. S. 227. A subsequent adoption of a benefit originally unrequested, though ineffective to ground an action in pure contract, (since the "consideration" would be "past") *Thomson* v. *Thomson* (N. Y. 1902) 76 App. Div. 178, may, however, render the adoptor liable *quasi ex contractu*. But often the benefit is incapable of rejection, e. g., repairs by one tenant in common, *Leigh* v. *Dickinson* (1884) 15 Q. B. D. 60; and, it seems, acceptance must consist in some positive act, such as pleading the stranger's payment in a suit by the creditor. Cf. *Goodnow* v. *Stryker* (1883) 61 Ia. 261. Affirmative steps toward avoiding an unsolicited benefit do not seem to be required. The fundamental notion is that no one can thrust himself on another as a creditor, either by improvement of his property or discharge of his obligation. The assignability of debt claims

is an exception, not to be widened by the grant of quasi-contractual remedies. But see *Crumlish* v. *Cent. Imp. Co.* (1893) 38 W. Va. 390.

It might seem that the considerations of policy and of natural justice affecting a conscious intermeddler should not defeat a person who has acted under mistake. But from the recipient's point of view, an unsolicited benefit is not changed in character because dictated by mistake. True, Equity often decrees compensation for permanent improvements to land under mistake of title. *Bright* v. *Boyd* (1841) 1 Story 478. But recovery in assumpsit under these circumstances is denied, *Welch* v. *Welch* (Ohio 1835) 5 Hammond 425; see Keener, Quasi-Contracts, 366 *et seq.;* likewise, where the property is personalty. *Isle Royale Mining Co.* v. *Hertin* (1897) 37 Mich. 332; but see Keener, *supra,* 385-6. Some few jurisdictions do allow recoupment *quasi ex contractu,* as well as in Equity, for tax-payments under mistaken belief of ownership, *Govern* v. *Russ* (1904) 125 Ia. 188; but this is a very questionable exception to the ordinary case of the discharge of any liability by a stranger. See *Janeway* v. *Burns* (N. Y. 1904) 91 App. Div. 165, 171; aff'd (1905) 180 N. Y. 560; Cooley, Taxation (3rd Ed.) 824. In laying down the broad rule that voluntary payments are not recoverable, the authorities reveal no conception of a payment as involuntary unless it has resulted from compulsion arising from circumstances with which the beneficiary is fairly to be associated. Cf. *Carr* v. *Stewart* (1877) 58 Ind. 581, 584; *Nat'l Bk.* v. *Bd. of Supervisors* (1887) 106 N. Y. 488, 494. In general, it is difficult to find any well settled right of recovery for benefits conferred under mistake of fact except where the mistake occurred in pursuance of some contractual relation, real or supposed, to which the defendant was in effect a party, as in the familiar case of failure of consideration.

Suppose that A, under mistake of fact, pays money to X, which X either passes to B directly or applies to B's debts. If B receive the money *bona fide* and for consideration, he may retain it, because commerce requires money so received in the course of business to be free of prior equities. *Stephen* v. *Bd. of Educ.* (1879) 79 N. Y. 183. In New York this rule is applied even where X uses A's money to restore misappropriated funds of B without B's knowledge either of the restitution or of the theft. *Nassau Bk.* v. *Nat'l Bk.* (1899) 159 N. Y. 456. This extension loses sight of the professed reason of the rule, and is referable rather to the theory that, the equities being equal, the legal title must prevail. But when X was B's agent, it may be questioned whether the principal, rather than A, should not, in equity, suffer from his agent's fraud. The result in *Read* v. *Rigby* L. R. [1894] 2 Q. B. 40, contrary to *Nassau Bk.* v. *Nat'l Bk., supra,* on similar facts, seems therefore preferable. Of course, if B had notice that A paid X as B's assumed agent, he is not in the position of a *bona fide* purchaser, and his acceptance may well be treated as a ratification of X's act. *Hathaway* v. *County of Delaware* (1906) 185 N. Y. 368. Now suppose that X, instead of paying the money to B directly, applies it to B's debts. If X has been authorized to discharge such debts, though not to borrow from A, recovery by A may fairly be granted, since practically B's affairs have not been disturbed. *Billings* v. *Monmouth* (1881) 72 Me. 174; but see *Agawam Nat'l Bk.* v. *So. Hadley* (1880) 128 Mass. 503. But the *mere* fact that B's debts have been paid with A's money would not alone obligate

B to A any more than if A had directly discharged them. *Kelley* v. *Lindsey* (Mass. 1856) 7 Gray 287. It has been further objected—inconsistently, it is submitted, with the equitable nature of the remedy—that A's relation to B is too remote: *Kilgour* v. *Finlayson* (1789) 1 H. Bl. 155: A enabled X to make the payment, but as it was X who chose so to apply the money, the benefit came from X rather than from A. *Nat'l. Bk.* v. *Bd. of Sup'rs, supra,* 494.

Some of these questions, it is conceived, were really involved in a recent New York case. *Title Guarantee & Trust Co.* v. *Haven* (1908) 111 N. Y. Supp. 305. The plaintiff (A) had accepted and paid a check, the signature of the maker of which was forged. The payee, the City of New York, applied it, at the forger's (X's) direction, without the defendant's (B's) knowledge, to discharge a lien against land which the defendant had already contracted to sell unencumbered and which he later so conveyed. Clearly the defendant was enriched to the amount of the lien, and at the plaintiff's expense. The benefit, however, was unsolicited, and, as the lien had been discharged of record, could not, it seems, be rejected. Moreover, as the benefit came from the payee of the check directly or as agent of the forger rather than from the plaintiff, it may be considered too remotely connected with the plaintiff, within *Nat'l Bk.* v. *Bd. of Supervisors, supra.* On the other hand, if the defendant restore, he will be no more out of pocket than if the whole transaction had never occurred, and so is not in the position of one who, if compelled to pay for unrequested improvements of his property, must invest additional capital. And the objection against sanctioning any disturbance of one's affairs by a stranger loses some force in this case in view of the contract (already partly performed) to convey the land unencumbered. *Stephen* v. *Bd. of Education, supra,* is not controlling, since here the defendant gave no consideration. Because of the exceptional circumstances, a recovery *quasi ex contractu,* would, it is submitted, conform to the broad conception of the remedy. But a denial of recovery finds support in the (somewhat meagre) authorities, especially *Nat'l Bank* v. *Bd. of Supervisors, supra.*

The Court (two judges dissenting) took the short ground that recovery was precluded by § 112 of the Negotiable Instruments Law: "The acceptor by accepting admits the genuineness of" the drawer's "signature." But the sole aim of the Negotiable Instruments Law, it would seem, is the currency of negotiable paper. How one who has surrendered nothing on the faith of an instrument can have been within the intent of the statute, is difficult to see. The corresponding section of the British Bill of Exchange Act, 45 & 46 Vict. c. 61, § 54 (2), expressly limits the drawee's admission to holders in due course; and in *Price* v. *Neal* (1762) 3 Burr. 1354, the repeatedly recognized source of the doctrine enacted by § 112, *supra,* the defendant was a *bona fide* holder for value, as in every subsequent available case. Cf. Story, Bills (4th Ed.) §§ 262, 411; Bigelow, Bills, etc. (2nd Ed.) 225. And the tendency has been to limit *Price* v. *Neal.* See Morse, Banking (3rd Ed.) Chap. XXXIII.

DAMAGES IN NEGLIGENCE CASES.—The fundamental distinction between the measure of the defendant's duty in determining whether a wrong has